No. 84-105

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

MARTIN FINE, WILLIAM BECKER and PHILIP BECKER, Individually and WILLIAM BECKER and PHILIP BECKER d/b/a BECKER & BECKER, all doing business as 649 BROADWAY EQUITIES CO.,

Petitioners,

vs.

BELLEFONTE UNDERWRITERS INSURANCE CO., CITIBANK, N.A., and JOHANA ZUCKERMAN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONERS

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We respectfully urge the Court to proceed with caution in considering the assertions and authorities cited in Respondent's brief. The breezy air of self-confidence in the brief's writing style conceals the patchwork nature of its legal arguments which are too often illogical, ill-founded, and based on authorities which are miscited and misconstrued. We will not attempt here

to correct every error but simply to alert the Court to some of the principal land mines planted beneath the surface.

The Nature of the Case

This case presents a fundamental question of judicial policy of national scope – whether a distinguished Court of Appeals can cast aside long-established State law and apply its own views on the interpretation and application of a State statutory provision which is in constant everyday use and which affects probably millions of insurance policies currently in effect in New York State (not to mention the dozens of other states which have identical provisions).

This petition is not a quest for "personal vindication" (R.Br. pp. ii, 2) – although fair play is obviously one of its objectives. The case in fact involves the question of entitlement to insurance proceeds of *over $1.5 million* which Respondent understandably is most anxious not to pay.

The ramifications of this case affect insurance policy coverage in the range of *billions* of dollars.

From the standpoint of this Court, the case involves the larger question of the proper division of responsibility and functions between Federal and State courts. In an era when many judicial administrators are urging termination of *diversity jurisdiction* in the Federal courts, the Second Circuit's decision offers a bonanza for out-of-state insurance companies who are able to benefit from looser standards for voiding coverage simply by removing their cases out of the State courts' reach.

The Erie Question

With an audacity that Mark Twain would admire, Respondent has asserted without blinking that there simply *is no Erie R.R. Co. v. Tompkins* issue presented by this case. Period. No citations. No argument. No reasons. (R.Br. p. 1- opening sentence.)

Respondent's Brief makes no effort whatsoever to dispute Petitioners' statement (Pet. pp. 11-12) that the Circuit Court's decision works a total repudiation of *Erie R.R. Co. v. Tompkins*

since the Court never even purported to apply New York law (the Court never did disclose in its opinion exactly what law it deemed applicable to this case) and each of the five authorities relied upon by the Court applied the law of a state other than New York.

It is difficult to conceive of a more important principle of Federal practice than the *Erie* mandate that in diversity cases the substantive law of the controlling State must be applied by Federal trial and appellate courts. The Circuit Court's decision rolls the calendar back to a pre-*Erie* application of choice of law principles and applicability of Federal common law.

Applicable New York Law

The basic strategy of Respondent's Brief is to first distort New York substantive insurance law and then to argue that although the Circuit Court did not apply New York law, the law of New York is similar to what the Court employed in its opinion.

The Court's opinion below is a significant and far-reaching determination of the insurance law of the State of New York. The Court's decision is *binding* on all Federal District Courts in the Second Circuit, including specifically the four Districts of New York. Its common law approach will likely be relied on by Federal and State courts in other parts of the United States.

Written v. Oral Misstatements

Respondent's Brief advances an ingenious but wholly erroneous premise, to wit, that there is a legal distinction between *written* misstatements by an insured and *oral* misstatements by an insured. The New York Courts do not recognize any such a distinction. There is no reason for such a distinction. Common sense says that such a distinction is absurd. The consideration of *oral* and *written* misstatements as legally interchangeable is clearly made in *Sunbright Fashions, Inc. v. Greater N.Y. Mut. Ins. Co.*, 34 A.D.2d 235, 310 N.Y.S.2d 760 (1st Dep't 1970), *aff'd*, 28 N.Y.2d 563, 319 N.Y.S.2d 609, 268 N.E.2d 323 (1971).

The controlling decisions of the New York Court of Appeals, as stated in *Jonari Management Corp. v. St. Paul Fire & Marine Ins. Co.*, 58 N.Y.2d 408, 461 N.Y.S.2d 760, 448 N.E.2d 427 (1983), *Deitsch Textiles Inc. v. New York Property Ins. Underwriting Ass'n*, No. 450, slip op. (July 2, 1984), and *Happy Hank Auction Co. v. American Eagle Fire Ins. Co.*, 1 N.Y.2d 534, 154 N.Y.S.2d 870, 136 N.E.2d 842 (1956), and the New York Appellate Division decision in *Hutt v. Lumbermens Mutual Cas. Co.*, 95 A.D.2d 255, 466 N.Y.S.2d 28 (2d Dep't 1983) set forth the New York rule applicable to *all* false statements:

> (1) They must be wilful and with intent to deceive, and
>
> (2) The proof of wilfulness must be clear and convincing.

Materiality

The Second Circuit has enunciated a sweeping new *per se* rule of materiality: if the insurance company lawyers ask a question, the answer is presumed to be material if the question asked was "reasonably relevant to the insurance company's investigation at the time." (B-10)

The New York rule, on the other hand, is that an answer is material only if the finder of the fact concludes it to be so "according to the facts and circumstances of the case." The New York Courts wisely recognize that circumstances vary in every case, and that a *per se* rule simply is inappropriate. *Porter v. Traders Ins. Co. of Chicago*, 164 N.Y. 504, 58 N.E. 641 (1900) and other cases cited at page 23 of the Petition.

Respondent's slipshod use of citations is painfully apparent in its argument on this point and the assertion (R.Br. p. 12) that "New York appellate courts have not hesitated to reverse lower court decisions and to rule as a matter of law that fraud and false swearing by an insured pertaining to matters considered material by the appellate court voided a property insurance policy." Respondent cites five decisions for this principle, but rather than supporting Respondent's position these decisions demonstrate the point made on page 22 of the Petition

that in *each instance* in which a court has decided to apply the forfeiture provision of state insurance law, the court has specifically found that the insured was engaged in a fraudulent scheme to obtain money from the insurer. Four of these cases concerned a fraudulently inflated proof of loss designed by the insured to obtain more money than he was entitled to recover: *Saks & Co. v. Continental Ins. Co.*, 23 N.Y.2d 161, 295 N.Y.S.2d 668 (1968); *Kantor Silk Mills Inc. v. Century Ins. Co.*, 223 A.D. 387, 228 N.Y.S. 822 (1st Dep't 1928), *aff'd*, 253 N.Y. 584, 171 N.E. 793 (1930); *Werber Leather Coast Co. v. Niagara Fire Ins. Co.*, 254 A.D. 293, 5 N.Y.S.2d 1 (2d Dep't 1938); and *Columbia Corp. v. Insurance Co. of North America*, 213 A.D. 798, 211 N.Y.S. 198 (1st Dep't 1928). The fifth case involved wilfully false testimony *and* fraudulently misstated interrogatories designed to recover for goods that were not covered by insurance: *Sunbright Fashions, Inc. v. Greater N.Y. Mutual Ins. Co.*, 34 A.D.2d 235, 310 N.Y.S.2d 760 (1st Dep't 1970), *aff'd*, 28 N.Y.2d 563, 319 N.Y.S.2d 609 (1971).

Every one of these cases turned *not$fl on the issue of materiality* but rather on the existence of *fraud* within the meaning of the statute.

Other Prominent Errors in Respondent's Brief

On page 5 of its Brief, Respondent initially asserts that the *Claflin* decision *does not* require a finding of wilfulness, but on page 10 it concedes that a finding of wilfulness *is* required under *Claflin*.

In a long footnote on page 6, Respondent casually attempts but fails to refute the statement of the New York law in the Petition (pp. 16-17) that the "clear and convincing" standard of proof is a substantive requirement of New York law. Respondent attempts to distinguish *Hutt v. Lumbermens Mutual Cas. Co.*, citing the *Demyan's Hofbrau, Inc.* District Court decision, but does not point out that *Hutt* expressly ruled that *Demyan's Hofbrau, Inc.* does *not* state the existing New York law (466 N.Y.S.2d at 30).

On Page 9, Respondent states that the New York Court of Appeals in the *Saks & Co.* decision "cited with approval" the *Claflin*

decision. The New York Court in fact only quoted a paragraph from an intermediate Appellate Court decision which includes *Claflin* in a string of cases.

Respondent's statement at page 3 that the District Court found "repeated instances" of false swearing is itself a false statement. The District Judge found exactly *one* instance where the testimony of the two witnesses for the owners was "false" and *one* instance where the testimony was "inaccurate and consequently false." (A-14) These answers were in the context ofsearching interrogations on three different days covering several hundred pages of transcript and ranging over such topics as the source of the fire; damage estimates; conversion plans; building employee responsibilities; alarm systems; removal of debris; lost rents; sprinkler system contracts; written statements by employees; heating plant, pipes and radiators; complaints from tenants; heating plant repairs; work performed on the buildings; purchase of heating oil; roof tanks; and the basis for the amounts claimed in proofs of loss. (The 461 page transcript of the complete interrogation is on file in the Court of Appeals.) The attempt to establish wilfulness by implication is plainly wrong. The District Court expressly stated that it had *not* found Petitioners' false testimony to be "knowingly and wilfully made, with intent to deceive the insurer." (C-2) Therein lies the rub.

The Second Circuit has radically altered the existing law so that now (as stated by the District Court in its ruling on our motion for a new trial (at C-3):

> As this court understands the Court of Appeals' decision, any false swearing in an examination by an insurer in a "relevant or productive area" voids the policy. No further facts need be adduced to meet this standard.

That statement by the District Court of the issues raised by this Petition is a far more reliable guide than the exceedingly partisan version in Respondent's Brief.

CONCLUSION

A writ of certiorari should issue to review and correct the decision of the Second Circuit.

Respectfully Submitted,

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